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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-373

DONALD JONES, *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 4, 1979

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The petitioner Donald Jones respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 20, 1979 and August 6, 1979.

OPINION BELOW

The opinion and order denying rehearing in the Court of Appeals, reported at 597 F.2d 485, appear in the appendix to this brief. The District Court rendered a written opinion on the search and seizure issue. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 20, 1979. A timely petition for rehearing and timely petition for rehearing *en banc* were denied without opinion on August 6, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's motion for new trial on the ground of juror misconduct should be denied, notwithstanding the rule that such misconduct is presumptively prejudicial, because the defendant failed to allege and prove that he acted with due diligence in asserting the misconduct?

2. Whether this Court's decisions in *Michigan v. Tyler,* 436 U.S. 499 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978) are retroactive?

STATUTORY PROVISIONS INVOLVED

Fed.R.Crim.P. 33. NEW TRIAL

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven days after verdict or finding of guilty or within such further time as the court may fix during the seven-day period.

STATEMENT OF THE CASE AND FACTS

Donald Jones was convicted by a jury of multiple offenses relating to the operation of a whiskey distillery. Three days after the verdict, one of the jurors contacted the trial judge and told him that she had been approached by petitioner's wife and a "a huge black man." (R. 197).[1] The court ordered the U.S. Attorney and an Alcohol, Tobacco and Firearms agent to interview all jurors to determine whether they had been similarly approached. (R. 198).

While the investigation was pending, petitioner moved for leave to interview the jurors. (R. 198). The trial court deferred ruling on the motion until the government completed its investigation. (R. 209).

Although the government's investigation was motivated by evidence that one or more of the jurors had been approached *after* the verdict, that investigation uncovered substantial evidence that someone had attempted to bribe one of the jurors *during* the trial. (R.

[1] "R" refers to the record on appeal in the United States Court of Appeals for the Fifth Circuit. "SR" refers to the supplemental record in that court.

218). It also established that at least one other juror was informed of the attempted bribe during the trial. (R. 219). The court set an immediate hearing "to ascertain whether jurors were improperly contacted, either during or immediately after the trial." (R. 213).

A hearing was held at which the jurors testified under oath. (SR. 1-55). The evidence was uncontradicted. It showed that someone had approached one of the jurors on more than one occasion during the trial and offered her a substantial sum of money to vote "not guilty" for petitioner. It showed that the contacted juror spoke with another juror on more than one occasion during the trial and informed the second juror of the attempted bribe. *There was no evidence that petitioner knew of, or had anything to do with, the attempted bribe.*

Notwithstanding uncontradicted evidence of a bribe attempt, the trial court denied petitioner's motion for new trial. The United States Court of Appeals for the Fifth Circuit affirmed. 597 F.2d 485 (5th Cir. 1979). It recognized the rule of "presumptive prejudice" previously established by this Court:

> It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new trial must be ordered unless the government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed. 654 *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956).

Id. at 487. The court refused to apply the rule, however, because petitioner did not prove that he acted with due diligence to discover the bribe attempt prior to the verdict:

> The [petitioner] had the burden of proving that this evidence was in fact newly discovered and that his failure to discover it prior to verdict was not due to his lack of diligence.
>
> * * *
>
> It is true that the evidence does not affirmatively establish the [petitioner's] involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge.
>
> * * *
>
> In this case [petitioner] presented no evidence whatever on the issues of his lack of knowledge or his due diligence . . . . All that [petitioner] has ever stated is that no evidence shows that [petitioner] was "connected with" the bribe offer. Thus [petitioner] never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play.

Id. at 488, 489, n.4.

The government never asserted in the trial court or on appeal that petitioner's motion for new trial should be denied because petitioner failed to show that he acted with due diligence in discovering the bribe attempt. The

point was simply never an issue at the trial court's evidentiary hearing. On rehearing, petitioner moved the Fifth Circuit to remand the case to the trial court to afford petitioner an opportunity to prove that he acted with due diligence.[2] The Fifth Circuit denied the motion.

Petitioner had also filed a pretrial motion to suppress evidence seized on the premises. The facts are accurately detailed in the trial court's opinion. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975). The search and seizure began when state officers received an anonymous phone call reporting a shooting on the premises. They arrived at the farm and searched the house and barn for anyone involved in or injured by the shooting. Their search was cursory. They found nothing in the house. They saw an apparatus in the barn which they could not identify. They secured both the house and barn.

They called another state officer who arrived and searched the barn again. He identified the apparatus in the barn as a still. He summoned federal agents.

The federal agents performed a comprehensive search of the house and barn. They searched the entire house and inspected the contents of drawers and closets. They seized numerous items which were the subject of the motion to suppress.

The officers admitted that the area was secure after the initial search for victims of the shooting. Both the

[2]Petitioner attached to the motion his affidavit showing due diligence.

second state officer and the federal agents admitted that they had ample time and opportunity to obtain a warrant. But they did not obtain one. The trial court specifically rejected the government's argument

> that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for the smaller items in the house, the county police had surrounded the area. Therefore, *no emergency existed concerning the speed with which the federal agents arrived on the scene.*

390 F.Supp. at 1020-21. The trial court nevertheless held that the federal search was valid. It held that any right of privacy had been eliminated by the previous state search:

> The rationale which justified the federal search is that the subsequent intrusion does not significantly increase a pre-existing legitimate interference with a protected interest.

390 F.Supp. at 1021. The fourth amendment was designed to prevent unauthorized invasions of privacy. Based upon *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), the trial court reasoned that

> once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment.

390 F.Supp. at 1021. It concluded that the federal search without a warrant was proper because

> the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county officers.

390 F.Supp. at 1022.

The trial court's decision was entered before this Court's recent decisions in *Michigan v. Tyler,* 436 U.S. 385 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978), which specifically reject the trial court's rationale. The Fifth Circuit refused to consider petitioner's claim that the trial court's decision was contrary to *Tyler* and *Mincey*. It concluded that *Tyler* and *Mincey* should not be applied retroactively. Instead, the "prevailing law" of the circuit, as stated in *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), should control.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Decision In *Remmer v. United States,* 347 U.S. 227 (1954), *appeal after remand,* 350 U.S. 377 (1956) And With The Court Of Appeals Decision In *Marshall v. United States,* 436 F.2d 155 (D.C.Cir. 1971).

In *Remmer v. United States,* 347 U.S. 227 (1954), *appeal after remand,* 350 U.S. 377 (1956), this Court recognized the fundamental importance of a fair and impartial jury when it concluded that evidence of jury tampering raises a "presumption of prejudice" which entitles the defendant to a new trial unless overcome by the government's affirmative proof of harmlessness.

> The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229. The Fifth Circuit recognized this presumption and the burden it places on the government, 597 F.2d at 487, but nevertheless proceeded to emasculate it by creating a "due diligence" requirement which shifted the burden of proof to the defendant.

The Fifth Circuit's newly created rule has a striking effect when viewed against the facts of this case. Once the government's investigation showed evidence of juror misconduct, the trial court ordered an evidentiary hearing "to ascertain whether jurors were improperly contac-

ted." (R. 213). The hearing which followed established precisely that. A juror had been bribed and at least one other juror had been aware of the bribe. There was no evidence that petitioner knew about the bribe or was involved in it. Neither the trial court nor the government at any time suggested that petitioner was required to prove "due diligence" at this hearing.

Application of *Remmer* mandated that petitioner was entitled to a new trial unless the government could prove that the bribe attempt was harmless. In fact, harmlessness was the only argument made by the government on appeal. But the Fifth Circuit never reached that issue. Instead, it concluded that petitioner had failed to meet the burden of proving "due diligence," a burden which was never placed on him before. The Fifth Circuit concluded that the absence of such evidence meant that the presumption of prejudice never arose. Under *Remmer,* it should have meant that the presumption of prejudice was never rebutted.

In *Remmer,* this Court held that the defendant was entitled to a new trial where someone approached a juror during trial and indirectly suggested the possibility of a bribe. When the defendant first filed his motion, the trial court denied it without holding an evidentiary hearing. The court of appeals affirmed on the ground that the trial court did not abuse its discretion. This Court reversed. It held that the improper contact was presumptively prejudicial. The defendant was entitled to a new trial unless the government could overcome the presumption. 347 U.S. at 229. It remanded the case to the trial court for an evidentiary hearing on the prejudice issue.

On remand, the trial court held that there was no prejudice. This Court again reversed. It concluded that there was no evidence to overcome the presumption of prejudice. 350 U.S. at 381. This Court held that the defendant was entitled to a new trial.

Remmer mandated reversal of this case for a new trial. Yet the Fifth Circuit circumvented *Remmer* and the burden of proof it imposed on the government. It viewed the appeal as one from a motion for new trial based on newly discovered evidence, although petitioner appealed the final judgment.

The Fifth Circuit held that petitioner had the burden of proving that the evidence of jury tampering was newly discovered and that failure to discover it prior to verdict was not due to his lack of diligence. 597 F.2d at 488-89. Yet the court also stated:

> It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, *our decision is grounded on the total lack of evidence disproving such involvement or knowledge.*

597 F.2d at 489, n.4.

Proving "due diligence" is no different than proving "harmfulness." Evidence that the defendant knew about the bribe attempt before the verdict but chose to do nothing would establish lack of due diligence. But such proof would also establish harmlessness, because the error would have been invited by the defendant. Under *Remmer,* however, that burden rests on the government, not the defendant. The fact that the government's

burden might be heavy[3] is no justification for shifting that burden back to the defendant under the guise of "due diligence."

The Fifth Circuit incorrectly applied the due diligence standard for another reason. The bribe attempt infringed petitioner's sixth amendment right to a fair and impartial jury. The due diligence standard does not apply to a newly discovered evidence claim of constitutional magnitude. *Marshall v. United States,* 436 F.2d 155 (D.C.Cir. 1971). In *Marshall,* the court of appeals reversed the trial court's holding that the defendant had to prove due diligence before he could obtain a new trial based on newly discovered evidence that the lineup in which he was identified was unconstitutional.

> The fault with the ruling of the trial court here is that appellant, if he has anything to complain about on this point, can complain that his constitutional right to due process under the Fifth Amendment has been denied him. Such alleged infringement of his constitutional rights could be raised by a collateral attack at any time subsequent to the conviction becoming final. If appellant can attack his conviction collaterally, his counsel's lack of diligence at time of trial should be no barrier to considering a motion for a new trial on the merits of the constitutional grounds raised.
>
> * * *
>
> Thus we are of the view that the "due diligence" standard which ordinarily governs disposition of motions for a new trial based on allegedly newly discovered evidence . . . should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction. Cf. the standard established by Fed.R.Crim.P. 52(a) for disregarding ordinary trial errors as "harmless" as contrasted with the higher standard which the Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) has held must be applied in judging the harmlessness of constitutional error.

436 F.2d at 158-59. *Marshall* was later recognized by the Fifth Circuit. *United States v. Shelton,* 588 F.2d 1242, 1250 (5th Cir. 1978). Yet the Fifth Circuit ignored it here.

The Fifth Circuit's circumvention of the presumption and burden of proof required by *Remmer* is also ap-

[3]The Fifth Circuit apparently feared that the government might never be able to meet its burden:

> The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

597 F.2d at 489. But here the government did not adduce any evidence whatsoever indicating that petitioner initiated the bribery attempt. Obviously, such proof by the government might be a basis for refusing to invoke the *Remmer* presumption. However, the possibility that some defendant *might* initiate a bribe attempt is an insufficient justification for denying to all defendants a fair and impartial jury which the *Remmer* presumption seeks to insure.

parent in light of the well-established line of decisions which hold that on appeal from final judgment, improper juror contacts constitute plain error which will be noticed by the court on its own initiative. *United States v. United States Gypsum Company,* 438 U.S. 422 (1978) (ex parte meeting between judge and juror warranted new trial although point not argued in trial court, in court of appeals or in supreme court briefs); *Rogers v. United States,* 422 U.S. 35 (1975) (court's instruction to jury in absence of counsel plain error).

Petitioner appealed from the final judgment.[4] He brought the issue to the trial court's attention before the notice of appeal was filed. He raised the issue on appeal. In *Rogers* and *United States Gypsum,* this Court found fundamental error warranting a new trial. *United States Gypsum* was a civil case in which the issue was not raised until oral argument. Yet this Court found plain error requiring a new trial.

This Court's opinion in *Remmer* was clear. Where there is evidence of improper juror contact, the government has the burden of overcoming the presumption of prejudice by proving that the contact was harmless. That rule cannot be circumvented by imposing an initial burden on the defendant to prove that he could not

[4]Petitioner appealed from the final judgment and conviction, not the motion for new trial. An appeal from an out-of-time motion for new trial is no substitute for an appeal from final judgment. *Edwards v. Cook,* 566 F.2d 960 (5th Cir. 1978); *Burnside v. Eastern Airlines, Inc.,* 519 F.2d 1127 (5th Cir. 1975). Conversely, the presentation of an ore tenus motion for new trial 19 days after verdict cannot deprive petitioner of his right to a plenary appeal of the final judgment which is governed squarely by *Remmer* and *United States Gypsum.*

have discovered the impropriety before verdict. Fundamental constitutional error is not subject to the rule of due diligence. The conflict between the *Jones* decision and the *Remmer* and *Marshall* decisions justifies the grant of certiorari to review the judgment below.

2. The Fifth Circuit Incorrectly Held That This Court's Decisions In *Michigan v. Tyler,* 436 U.S. 499 (1978) And *Mincey v. Arizona,* 437 U.S. 385 (1978) Are Not Retroactive.

The search and seizure which were the subjects of petitioner's motion to suppress occurred on April 12, 1974. This Court decided two cases in 1978 which squarely govern the propriety of the search and seizure. *Michigan v. Tyler,* 436 U.S. 499 (1978); *Mincey v. Arizona,* 437 U.S. 385 (1978). The Fifth Circuit misapplied this Court's decision in *United States v. Peltier,* 422 U.S. 531 (1975) in determining that *Mincey* and *Tyler* were not retroactive.

In *Peltier,* this Court determined that its decision in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) should not apply retroactively. However this Court carefully pointed out that it so ruled because *Almeida-Sanchez* was a clear departure from existing statutory and case law and law enforcement officers had a right to rely on that prior law:

> The Border Patrol agents who stopped and searched respondent's automobile were acting pursuant to §287(a)(3) of the Immigration and Nationality Act of 1952 . . .

> Between 1952 and *Almeida-Sanchez*, roving Border Patrol searches under §287(a)(3) were upheld repeatedly against constitutional attack . . . .
>
> It was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this Court, . . . we cannot regard as blameworthy those parties who conform their conduct to the *prevailing statutory or constitutional norm*.

422 U.S. at 540-41 (footnotes omitted).

Almeida-Sanchez was this Court's first roving border patrol case and was contrary to the "prevailing statutory or constitutional norm." This Court therefore concluded that the decision should not affect searches conducted pursuant to that norm. *Mincey* and *Tyler*, however, were not the first cases to deal with exigent circumstances and the right of privacy. They were not contrary to the prevailing constitutional norm. Rather, they were fully in accord with the norm which existed not only when they were decided, but also when the searches in this case were conducted. There is no issue of retroactivity because *Mincey* and *Tyler* did not create any new constitutional principle.

In *Mincey* and *Tyler*, this Court held that once the exigent circumstances which justify the initial intrusion into defendant's premises disappear, law enforcement officers cannot search any further in the absence of a warrant. In *Mincey*, this Court rejected the argument, relied on by district court and the government here, that the initial police intrusion into a building justified by an emergency eliminated any right of privacy in the premises and justified a subsequent warrantless search.

> It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. [citations omitted]. It is quite another to argue that he also has a lessened right of privacy in his entire house.

437 U.S. at 391. This conclusion was not based on any new constitutional principle. It was well-settled law from this Court's prior decisions.

> Indeed this very argument was rejected when it was advanced to support a warrantless search of a dwelling where a search occurred as "incident" to the arrest of its occupant. *Chimel v. California,* 395 U.S. 753, 766 n.12, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685.

Id. Chimel was decided in 1969, four years before the search in this case. This Court was explicit in *Chimel*:

> [W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically

be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

395 U.S. at 766, n.12.

This Court also held in *Mincey* that the warrantless first search had to be circumscribed by the emergency which initially justified it. Once the emergency ended, any further search required a warrant. Again, this holding merely reiterated this Court's prior decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *Mincey*, *supra*, 437 U.S. at 390. As this Court stated in *Terry*:

> A search for weapons in the absence of probable cause to arrest, however, must, *like any other search*, be strictly circumscribed by the exigencies which justify its initiation. [citations omitted].

392 U.S. at 25-26 (emphasis added).

The Fifth Circuit itself has not consistently dealt with the retroactivity issue. It has applied *Peltier* in the same manner which petitioner urged in this case. *United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976) (opinion on rehearing *en banc*). In *Martinez*, a search took place subsequent to *Almeida-Sanchez* but before the decisions in *United States v. Ortiz*, 419 U.S. 824 (1975) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The government contended that *Ortiz* and *Brignoni-Ponce* could not be considered in determining the validity of the search. The Fifth Circuit rejected that contention.

> Here then we have a search post *Almeida-Sanchez* and pre-*Ortiz*. The government argues that the extension of the rule announced in *Almeida-Sanchez*, applied to checkpoint searches for the first time in *Ortiz*, should not be given retrospective application. We disagree. *Ortiz* did not establish a new rule in an *overruling decision*. See *United States v. Peltier*, 1975, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374; *United States v. Miller*, 5 Cir. 1974, 492 F.2d 37, 40. On the contrary the Court took pains to point out that it was following *Chambers v. Maroney*, 1970, 339 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419, and *Almeida-Sanchez*.

526 F.2d at 955 (emphasis by court). The court also rejected the argument that *Brignoni-Ponce* should not be considered retrospectively because

> *Brignoni-Ponce* did not establish a new rule in an overruling decision, *Miller*, *supra*, or a new constitutional principle, *Peltier*, *supra*.

526 F.2d at 956.

In *Mincey*, as in *Ortiz*, this Court carefully pointed out that it was following established law. It did not establish a new constitutional principle or an overruling decision. The limited nature of exigent circumstances which justify a warrantless search was spelled out in *Terry* in 1968. The effect of a limited intrusion on a person's right to privacy was spelled out in *Chimel*. *Terry* and *Chimel* established the parameters of the officers'

conduct at the time of the search in this case. The justification advanced in *Peltier* for denying retrospective application of *Almeida-Sanchez* simply does not apply to *Mincey*.

The Fifth Circuit's refusal to apply *Mincey* and *Tyler* means that every time this Court applies one of its earlier search and seizure decisions to a different set of facts that application has no effect on searches conducted prior to it. In *Peltier*, this Court criticized Justice Brennan's dissent in which he stated that "the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts." 422 U.S. at 542, n.13. Yet that is precisely what the Fifth Circuit did here. *Terry* and *Chimel* required suppression of the evidence by the trial court. *Mincey's* application of *Terry* and *Chimel* required suppression by the Fifth Circuit. The facts of *Terry* and *Chimel* were not identical to this case. The application of those cases to identical facts occurred after the search. Yet the Fifth Circuit applied the retroactivity concept.

Peltier did not intend such a result. Once this Court proscribes a certain type of conduct, the government should not need additional case law on each fact situation to which that rule of law could be applied before the government agents "have notice" of the law. That would eliminate the deterrent effect of the exclusionary rule. *Compare Peltier*, *supra*, 422 U.S. at 538-39. The Fifth Circuit's distortion of this Court's decision in *Peltier* justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Fifth Circuit.

Respectfully submitted,

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September 4, 1979

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Donald E. JONES,
Defendant-Appellant.

No. 78-5509.

United States Court of Appeals,
Fifth Circuit.

June 20, 1979.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH and VANCE, Circuit Judges, and BOOTLE,* District Judge.

BOOTLE, District Judge:

Convicted by a jury of multiple offenses relating to the operation of an illegal whiskey distillery and not challenging the sufficiency of the evidence, appellant urges two grounds for reversal: first, alleged error in denying his motion for new trial upon his showing that someone attempted to bribe a juror during trial and, second, alleged error in denying his motion to suppress

*District Judge of the Middle District of Georgia, sitting by designation.

evidence seized in a search made without a search warrant. For reasons following we affirm.

On August 1, 1975 a jury convicted the appellant, Donald E. Jones, on five counts of a seven count indictment arising out of his participation in the operation of an illegal whiskey distillery. The district court dismissed one count as duplicative of other counts and the jury acquitted appellant on one count. Appellant failed to appear for a hearing and sentencing on August 20, 1975 and was not apprehended until almost three years later. He was finally sentenced on June 23, 1978 and now appeals his conviction.

I. Jury Tampering

Two days after the verdict, one of the jurors was contacted by appellant's wife, Debra Jones, and "a huge black man" who was later identified as Willie Lucas. Lucas solicited this juror's agreement that appellant had been "shanghaied" and refused to tell her how her address had been found. This juror, being upset, contacted the trial judge who on August 4, 1975 entered an order directing an investigation by the United States Attorney's office and the Bureau of Alcohol, Tobacco and Firearms. The court directed that all statements taken during the investigation be filed with the Clerk as part of the record. The positive identification of Willie Lucas as the "huge black man" is supplied in a report of an interview with Lucas so filed.

On August 5, 1975, appellant submitted a motion to interview jurors pursuant to a local rule and filed in support thereof an affidavit dated August 4, 1975 by the same Willie Lucas which detailed post-verdict state-

ments made by another juror, Arlie Crooms. Ms. Crooms was quoted as saying to him that she did not feel that the right verdict was given, that there was no proof that appellant owned the stills, and that she voted guilty only because of pressure from other jurors and her illness during the deliberations.

During the court ordered investigation, ATF agents interviewed all the jurors concerning possible approaches. When they interviewed Ms. Reboso, one of these jurors, they were told that juror Arlie Crooms had told her during the trial that she had been offered $1000 by someone to vote for acquittal. Subsequently, Ms. Crooms was interviewed and denied any improper approach. She later recanted and informed the ATF of a bribe offer by Willie Lucas who asked that she vote to acquit appellant.

The district court ordered a hearing on the matter for August 20, 1975. At the hearing, Ms. Crooms, Ms. Reboso, and the juror who was subjected to a post-verdict approach all testified. They were questioned by the Government attorney and by counsel for a co-defendant, B. J. Herndon, but no questions were asked by appellant's counsel. In fact, no evidence at all was submitted on behalf of appellant. The district court was informed that the Marshal had been unable to serve a subpoena on Willie Lucas and that the Marshal had been told that Lucas had decided to go to Nassau until August 24th. As stated previously, appellant also failed to appear and participate in this hearing despite the fact that by order of August 12, 1975 the district court had commanded his presence and despite the fact that at 10:30 A.M. on the morning of the hearing appellant and

his wife were in his attorney's office at which time his attorney cautioned him to be present for the hearing at 1:00 P.M. The only explanation of his absence was made by his attorney as follows: "I spoke to Mrs. Debra Jones. She said that she left Donald a while ago and he was on his way down here. They came in separate cars. She made it; I don't know why he didn't make it." As above indicated, appellant's wife Debra (with separate counsel) was present at the hearing and, despite her participation in the post-verdict approach to a juror, was not called by appellant's counsel or by anyone as a witness. At the conclusion of the testimony, appellant's counsel made a motion which in substance was a motion for a new trial[1] and the district court denied it.

It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new

[1]Appellant's motion is quoted in full below:

> I would like to make a Motion at this time on behalf of Mr. Donald Jones that based upon the testimony adduced here from the juror, Mrs. Crooms, and which is corroborated by Mrs. Reboso, and whom Mrs. Crooms corroborates, the fact that Mrs. Reboso had made mention she knew a particular witness and the fact that for two days, apparently, Mrs. Reboso had known the name of one of the defendants, and Mrs. Crooms said that she had reached a verdict, apparently not by choice but by what she says was the — either the other understanding of Mrs. Reboso or some of the other jurors, that she would have to come back and she wasn't feeling well, and that she reached a verdict that did indicate what she felt to be her verdict; she did it because of compliance with other jurors, so on that basis and on the testimony adduced, I would make a motion on behalf of Don Jones to set aside the verdict as returned by this jury.

trial must be ordered unless the Government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956). Both appellant and the Government have concentrated their efforts primarily on the question of harmlessness raised in *Remmer.* The Government has asserted that both jurors, Ms. Reboso and Ms. Crooms showed by their testimony that the bribe offer had no effect on their deliberation.[2] Appellant insists that harmlessness was not shown. Both sides have overlooked some fundamental issues inherent in the procedural context in which appellant's motion was made. Since these questions are controlling, this court need not reach the issue of harmlessness.

The jury's verdict was returned August 1, 1975. A timely motion for new trial was filed on August 8, 1975 and overruled on August 12, 1975. Appellant's motion which is the subject of this appeal was not made until August 20, 1975. After seven days from the date of the verdict, a motion for new trial cannot be entertained unless it is based on newly discovered evidence. Fed.R.Cr.P. 33. Appellant's motion was thus one which would have to be founded upon allegedly newly dis-

[2]Juror Crooms testified: "I didn't say anything to her (referring to Juror Reboso) because after she didn't call me, I didn't say anything to her because I had decided to forget about it." (Supp. R. 19). Juror Reboso testified: "I didn't think of it at all. I was having personal problems which were more important to me at the time. I sort of heard her and it went in one ear and out the other because my problems were major problems. I mean, I am being as sincere as I can be." (Supp. R. 38). In addition Juror Crooms argued for appellant's acquittal during jury deliberations and the jury did in fact acquit him of one count.

covered evidence of an improper communication to a juror. This court and the Court of Appeals for the Sixth Circuit have recognized the propriety of categorizing such a motion as one for a new trial based upon newly discovered evidence. *Richardson v. United States*, 360 F.2d 366 (5th Cir. 1966); *Zachary v. United States*, 275 F.2d 793 (6th Cir. 1960). Both the Government and appellant have treated the issues in this case without recognizing the requirements and burdens placed on a defendant presenting such a motion.

In most new trial motions based on newly discovered evidence, the proffered evidence goes directly to proof of guilt or innocence. In such a motion the movant has a burden of showing (1) that the evidence was in fact discovered after the verdict, (2) that the movant's failure to learn of this evidence was not due to any lack of diligence on his part, (3) that the evidence is material and not merely cumulative or impeaching, and (4) that a new trial would probably result in an acquittal. *United States v. Bryant*, 563 F.2d 1227 (5th Cir. 1977); *United States v. Rachal*, 473 F.2d 1338 (5th Cir. 1973); *United States v. Hagerty*, 561 F.2d 1197 (5th Cir. 1977); *United States v. Schwartzenbaum*, 527 F.2d 249 (2d Cir. 1975); *United States v. Ellison*, 557 F.2d 128 (7th Cir. 1977). Admittedly, there are major distinctions in the substance of the evidence proffered by the appellant and that proffered in the above cited cases since appellant's evidence goes to the fairness of the trial rather than to the usual question of guilt or innocence. Regardless of those distinctions a motion for a new trial can not be based on newly discovered evidence unless that evidence is in fact unknown to the movant until after the verdict. The appellant had the burden of proving that this evidence was in fact newly discovered and that his

failure to discover it prior to verdict was not due to his lack of diligence.[3] *Zachary v. United States, supra; see United States v. Ellison, supra*. It deserves note that in *Remmer*, it was established, by the Government's failure to deny, that "[n]either the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict." 347 U.S. at 228, 74 S.Ct. at 451, 98 L.Ed. at 655. Such a burden is eminently reasonable in view of the devastation which jury tampering could bring to our country's highly valued jury system. The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

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[3]Another line of cases forcefully shows the relevance of a defendant's knowledge or lack of knowledge before the verdict of jury tampering. These cases teach that a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct. *Oakes v. Howard*, 473 F.2d 672 (6th Cir. 1973); *United States v. Brumbaugh*, 471 F.2d 1128, 1130 (6th Cir. 1973) (McCree, J., concurring); *United States v. Carter*, 433 F.2d 874 (10th Cir. 1970); *Hall v. United States*, 396 F.2d 428 (10th Cir. 1968); *United States v. Coduto*, 284 F.2d 464 (7th Cir. 1960). The rule requiring a showing that the evidence of jury tampering is newly discovered and the rule of waiver established by the above cited cases are not aimed necessarily at discovering a defendant's complicity in the improper communication to the jury. The policies behind both rules fully encompass any knowledge possessed by the defendant before the verdict whether it be innocent or not. Such knowledge should be disclosed to the trial judge before the verdict so that an attempt can be made to salvage the trial by ridding the jury of prejudicial influences.

In this case appellant presented no evidence whatever on the issues of his lack of knowledge or his due diligence. In fact, his counsel did not even disclaim such knowledge on behalf of appellant. All that appellant has ever stated is that no evidence shows that appellant was "connected with" the bribe offer.[4] Thus appellant never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play. The district court was correct in denying appellant's motion for new trial.

II. Motion to Suppress

Appellant's other contention is that the district court should have suppressed evidence seized by ATF agents during a search conducted without a warrant. On April 12, 1974, local police officers responded to a reported shooting at the premises leased by appellant. During their search for suspects or injured persons, these officers discovered appellant's illegal stills and other related paraphernalia. These local officers then called in ATF agents who seized certain evidence. This court agrees with the district court's conclusion[5] that the ATF agents' conduct was proper under the doctrine of *United States v. Green*, 474 F.2d 1385 (5th Cir. 1973) which was the then prevailing law of this circuit. *See, United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977).

Appellant contends that two recent Supreme Court cases, *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), invalidate *Green* and require that the evidence seized in the instant search be excluded. We conclude that *Tyler* and *Mincey* should not be applied retroactively on the facts of this case. *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977).

AFFIRMED.

[4] It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge. Though not a basis for our decision, it is interesting to note that the circumstances that are shown by the record tend to show rather than negate such knowledge or involvement. Willie Lucas, who offered the bribe, accompanied appellant's wife two days after the verdict in an attempt to solicit a juror to impeach the verdict. In furtherance of this endeavor, Lucas submitted an affidavit as support for appellant's motion to interview jurors. Events that came to light at trial also raise questions. It is clear that Debra Jones and a Government witness, with appellant's knowledge, negotiated an agreement to pay said witness a large sum if he would not testify. The witness claims that appellant offered a bribe; appellant describes these events as an extortion attempt by the witness. Unfortunately, we have no way of knowing what the jury thought of these contacts.

[5] *United States v. Herndon*, 390 F.Supp. 1017 (S.D.Fla. 1975).

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5509 — U.S.A. v. DONALD E. JONES

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By/s/Sally Hayward
Deputy Clerk

cc: Mr. Neal R. Sonnett
Mr. Marc Cooper
Mr. Bruce A. Zimet

UNITED STATES of America

v.

Bobby J. HERNDON et al.,
Defendants.

No. 74-549-Cr-CF.

United States District Court,
S.D. Florida.
Feb. 20, 1975.

William Northcutt, Asst. U.S. Atty., Miami, Fla., for the United States.

Bernstein & Robrish, Miami, Fla. for defendant Bobby J. Herndon.

Max P. Engel, Miami, Fla., for defendant Donald E. Jones.

Louis Stoskopf, Miami, Fla., for defendant Thomas E. Jones.

ORDER

FULTON, Chief Judge.

In an Indictment filed on September 25, 1974, the defendants were charged with the illegal operation of a still located at Barn No. 4, 19955 S.W. 248th Street, Dade County, Miami, Florida, in violation of 26 U.S.C. §§5601(a)(1), (2), (4), (8), 5602, 5604, and 18 U.S.C. §371. On November 12, 1974, defendants Herndon,

Donald Jones and Thomas Jones filed a motion to suppress various equipment, supplies and miscellaneous items useable in the manufacture of whiskey which were seized on April 12, 1974 during a search of the barn, the house, several vehicles, and the person of Thomas Jones in the vicinity of 19955 S.W. 248th Street, Miami, Florida. Defendants contend that the search constituted a violation of the Fourth Amendment of the United States Constitution in that it was made without a search warrant and not incident to a lawful arrest. The government argues that the search was justified due to exigent circumstances. The government concedes that the defendants all have standing to bring this motion to suppress: Thomas Jones was on the premises when the search took place; Donald Jones was renting the premises; and Bobby Joe Herndon was living on the premises.

On December 13, 1974, the Court held an evidentiary hearing on defendants' motion. Testimony presented at the hearing established that on Friday, April 12, 1974, at 7:31 P.M. the Dade County Public Safety Department Perrine Substation received a call that there had been "shots fired in the area" at 19955 S.W. 248th Street. At 7:33 P.M., a patrol car unit was dispatched with one back-up unit. At 7:46 P.M. these two units responding to the call arrived on the scene.

As reflected by plaintiff's exhibit 1A, 19955 S.W. 248th Street, Dade County, Florida, is a rural farm area. The subject property consists of a house approximately 150 Feet from the road and a single story barn approximately 300-400 Feet from the rear of the house. The barn is approximately 50 Ft. in width and 500 Ft. in length.

Officers Charter and Dwyer were the two units who were dispatched to answer the call at 7:33 P.M. Officer Dwyer was the backup unit. Prior to either officer reaching the scene of the alleged shots, they were met by an unidentified white female in a light colored Cadillac who communicated with Officer Dwyer that one of the participants in the alleged shooting was parked on the corner of 199th Avenue and 244th Street. Both officers proceeded to this area. Both officers approached the defendant, Thomas Jones, who was seated in his automobile. Mr. Jones' automobile was parked approximately 200 yards from the rear of the subject barn. During the conversation with defendant, Thomas Jones, a 16 year old white male approached the officers and informed them that Thomas Jones did, in fact, reside at the scene and was, in fact, a participant in the "shots fired" as reported earlier. Thereafter, Officer Dwyer left the area with his unit and proceeded to 19955 S.W. 248th Street, where the house and barn are located. Officer Charter remained with defendant Jones, who was not yet under arrest.

Upon arriving at the scene, Officer Dwyer spoke with several more neighbors who informed him that they had observed three white males leave the barn, one entering his automobile and driving to the road in front of the house, the other two leaving the house at which time the shots were fired in the immediate area. After this information was related to Officer Dwyer, he approached the house and heard the telephone ring. On the front porch Officer Dwyer looked into the living room area through the front picture window and then entered the house, without knocking, through the partially opened door, and proceeded through the living room area into the kitchen where he answered the phone. Officer Dwyer

testified that he entered the house and subsequently the barn to look for injured persons or additional witnesses in connection with the shooting investigation. Officer Dwyer then looked around and saw no blood or injured people in the house.

Having found no one in the house, Officer Dwyer communicated with Officer Charter to proceed to the barn to search for injured people there. Officer Charter then arrived with defendant Jones in the rear cage portion of the car. Officer Charter testified that Jones had been arrested by this time for loitering and prowling because he could not explain his presence in the area. Officer Charter testified that the barn door was partially opened approximately 4 to 6 inches. The officers entered the barn equipped with flashlights and remained in the barn approximately 5 to 10 minutes. In the rear portion of the barn the officers came across what appeared to them to be some form of a "still". The officers then departed the barn, went back to the house at which time Officer Dwyer telephonically communicated with the Perrine Substation for them to dispatch the duty Lieutenant to proceed to the scene. Lt. Lyons arrived at the scene at approximately 8:30 P.M. and spoke with both Officers Dwyer and Charter. Subsequently, all three officers re-entered the barn and again viewed what the officers concluded was a possible illegal "still". The officers then departed the barn, re-entered the house at which time Lt. Lyons again telephonically communicated with the Perrine Substation and requested specifically that a Federal Treasury Agent, Agent Nowicki be telephoned and informed that an illegal still was being operated at the subject location. Agent Nowicki and Agent Harmon of the Bureau of Alcohol,

Tobacco and Firearms of the United States Treasury Department (hereinafter referred to as "ATF") arrived at approximately 10:00 P.M.

Treasury Agent Nowicki, after receiving the communication from the Perrine Substation, called Agent Harmon and requested that he accompany him to the location in the Southwest area of Dade County where the illegal "still" had been reported. Agent Nowicki readily admitted in his testimony that he attempted no communication whatsoever with any United States Attorney, Federal Judge or Magistrate at any time whatsoever on the evening of April 12, 1974.

Upon the arrival at approximately 10:00 P.M., Agent Nowicki testified that he read defendant Jones his rights and was handed a small wrench and knife purportedly taken from defendant, Thomas Jones upon his arrest by Officer Charter. Agent Nowicki purportedly observed a substance "mash" on the wrench itself and requested of defendant Jones to take his shoes off for possible evidence. Both Agents Nowicki and Harmon spoke with Lt. Lyons and Officers Charter and Dwyer as to their observations in the subject barn. The agents then proceeded to the barn, and viewed the still. From there they went to the house, following the electric wires from the still water pump. In the house they found several receipts from the Tropigas Company, a Georgia telephone book and some shoes, on the soles of which was mash. The gas receipts were in a closet in the hall by the electric panel where the wires terminated. The closet was open. The phone book was in a drawer which was partially open in a table and the shoes were on the floor in the bedroom.

The ATF agents then went outside the house and peeked into a truck camper parked on the lawn. In the truck they observed cardboard cartons similar to the ones they saw beside the still. These cartons were labeled "Reliance Products Ltd., Winnipeg, Canada." The truck was seized and the glove compartment was searched. An auto repair bill was found therein. The interior of the rear of the truck camper smelled of whisky. This occurred about 11:00 P.M.

The ATF agents then went to the car in which Jones was found. They saw in it items similar to those they saw by the still. They searched and seized it. In it they found a hydrometer.

All of the state and federal agents who testified at the hearing readily admitted that absolutely no attempt whatsoever was made to obtain any arrest or search warrants. In their view, none were required due to the exigent circumstances. Therefore, unless the Court finds that the searches were not justified and thus grants the motion to suppress, the Government will introduce at trial the following items from these searches and seizures:

1. The driver's license, wrench and shoes found on Thomas Jones.

2. Pictures and testimony about the still and related paraphernalia from the area of the barn.

3. The receipts, phone book and shoes from the house.

4. The cartons and receipt from the truck camper in the yard.

5. The hydrometer found in the car in which Jones was arrested.

Two searches were conducted in this case, the first by county police, and the second by federal ATF agents. In order to be upheld, both searches must be valid.

Defendant Thomas Jones was placed under arrest by the county police officers at about 8:15 P.M. on April 12, 1974 for loitering and prowling. However, the search of the house and barn by the state officers can not be considered as incident to a legal arrest for the following reasons: 1) Officer Dwyer had already entered and searched the house before Officer Charter placed Jones under arrest. 2) The officers entered the barn pursuant to their investigation of the shooting incident which had no relation to an arrest for loitering and prowling. Later in the evening an ATF agent placed Jones under arrest for the additional charge of possession of a switchblade knife. This arrest, however, occurred after both the house and barn had been searched by the county officers. 3) The county officers testified that both the loitering and prowling and possession charges against Jones were later dismissed for lack of prosecution and never refiled. This factor is some support for defendants' contention that the arrests themselves were not legal.

The Court finds, however, that the county officers' search was legal as based upon the exigent circumstance of looking for victims of a shooting incident. Being in a place where they had a right to be, the officers found the

still because it was in plain view. Witnesses had reported that they had heard shots fired and had seen three men running in the vicinity of the house and barn. Therefore it was logical and prudent for the officers to consider that there might be someone injured and in need of help in the house or the barn. The fact that no victims were actually found does not negate the real possibility that existed.

In Guzman v. Estelle, 493 F.2d 532, 537 (5th Cir. 1974), the court held that lack of time in which the search warrant could have been secured is an exigent circumstance that justifies a warrantless search. In this case, it would be senseless to expect police officers to obtain a warrant before answering the dispatch call, or, once on the scene, before entering the buildings. Clearly, in matters involving possible injury by gun shot, time is of the essence.

Once legally inside the barn, the still was in plain view. In Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970), Justice Stewart held that where the initial intrusion that brings the police within plain view of an article is supported not by a warrant but by one of recognized exceptions to the warrant requirement, the seizure is legitimate. He stated that the plain view doctrine may be applied where an officer is not searching for evidence against the accused, but inadvertently comes across an incriminating object. *Id.* at 466, 91 S.Ct. 2022. Where objects fall in the plain view of an officer who has a right to be in the position to have that view, they are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

In this case the officers were searching for victims of a shooting incident. They entered the house and barn looking for victims, and inadvertently came across evidence of the operation of a still. No evidence was presented at the hearing to indicate that the officers' testimony of the reasons for their conduct should not be believed. Therefore the Court concludes that the search and seizure conducted by the county officers were legal.

The Court further finds that the search by the federal officers was also legal. The Court does not base its decision on the ground suggested by the government: that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for smaller items in the house, the county police had surrounded the area. Therefore, no emergency existed concerning the speed with which the federal agents arrived on the scene.

The federal search was legal because it was based upon a legal search by the county officers. Crucial to this determination are the facts that the county police called the federal agents to the scene, and that the federal search was directly related to the object of the county search.

The Court bases its determination that the federal search was legal upon the direct precedent established

by Judge Dyer in United States v. Green, 474 F.2d 1385 (5th Cir. 1973), cert. denied, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63 (1973). While Green was away, a fire broke out in his apartment. City firemen entered the apartment to put out the fire, and requested the Fire Chief to come to the premises to determine the cause of the fire. During his investigation the Fire Chief inadvertently discovered counterfeiting plates. The Fire Chief then called the Secret Service. In response to the call, a Secret Service agent went to Green's apartment, and the Fire Marshall handed him the plates he had discovered. At no time did either the city or federal authorities seek to obtain a warrant.

Judge Dyer held that it was not necessary for the secret service agent to have obtained a warrant before he entered the apartment even though there was plenty of time in which to do so. 474 F.2d at 1390. Judge Dyer explained that the purpose of the Fourth Amendment is to prevent unauthorized invasions of privacy. However, once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment. Judge Dyer's holding is directly applicable to the factual situation here:

> The purpose of a search warrant is to ensure judicial authorization, in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is

> expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized.

474 F.2d at 1390.

The rationale which justifies the federal search is that the subsequent intrusion does not significantly increase a preexisting legitimate interference with a protected interest. United States v. Soriano, 482 F.2d 469, 476 (5th Cir. 1973). Thus the determination that the subsequent search does not significantly add to the invasion of privacy caused by the initial search is crucial. As pointed out in *Soriano*, this requirement is met if the successive intrusions are close in time, practically identical in nature and analytically and factually separable only because made by two different sovereigns. 482 F.2d at 476 n.13. The Court finds that all of these criteria were present in this case.

In United States v. Carney, 356 F.Supp. 855, 858 n.1 (M.D.Tenn. 1973), the court distinguished its facts from *Green* in that in *Green* the secret service agent entered "subsequent to and pursuant to" the discovery of the Fire Marshall. The rationale is that independent

searches constitute separate and additional invasions of privacy. However, here as well as in *Green*, the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county oficers. Therefore, based upon the authority of United States v. Green, United States v. Soriano, and United States v. Carney, the Court concludes that the search and seizure conducted by the federal officers were legal.

The Court has considered all of the evidence presented at the evidentiary hearing, and has studied all of the submissions filed by the parties. For the foregoing reasons, the Court concludes that the searches of both the county and federal officers were legal, and therefore the motion to suppress the evidence seized therefrom is hereby denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

By:_____

ROBYN GREEN, ESQUIRE
Suite 500, Roberts Building
28 West Flagler Street
Miami, Florida 33130
Counsel for Petitioner

Supreme Court, U. S.
FILED
DEC 27 1979
MICHAEL RODAK, JR., CLERK

No. 79-373

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONALD JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KATHERINE WINFREE
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-373

DONALD JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 597 F.2d 485. The opinion of the district court (Pet. App. 11a-22a) is reported at 390 F. Supp. 1017.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1979. A petition for rehearing was denied on August 6, 1979 (Pet. App. 10a). The peti-

tion for a writ of certiorari was filed on September 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be reversed because of the use at trial of evidence obtained by federal officers in a warrantless search of petitioner's premises.

2. Whether petitioner is entitled to a new trial because a juror was offered a bribe during the trial that resulted in his conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing an unregistered distillery, in violation of 26 U.S.C. 5179(a) and 5601(a)(1), engaging in the business of a distiller without filing an application and receiving notice of registration, in violation of 26 U.S.C. 5171(a) and 5601(a)(2), carrying on the business of a distiller without having given bond, in violation of 26 U.S.C. 5173(a) and 5601(a)(4), engaging in the business of a distiller with intent to defraud the United States of the tax on the spirits distilled, in violation of 26 U.S.C. 5602, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] He was sentenced to consecutive

[1] At the close of the government's case, the district court dismissed one count charging petitioner with unlawful production of distilled spirits, in violation of 26 U.S.C. 5601(a)(8) (Tr. 784). The jury acquitted petitioner on one count charging him with the possession and transfer of unstamped distilled spirits, in violation of 26 U.S.C. 5205(a)(2). Co-defendant Bobby J. Herndon was convicted on the same charges as petitioner. Co-defendant William Mimbs was acquitted on all counts. Co-defendant Thomas Jones was found incompetent, and his case was therefore severed from petitioner's before trial. Thomas Jones died soon after petitioner's trial was completed.

terms of four years' imprisonment on the conspiracy count and three years' imprisonment on the possession count. He was also sentenced to concurrent terms of three years' imprisonment on each of the remaining counts, those sentences to be served concurrently with the sentences imposed on the conspiracy and possession counts.[2] The court of appeals affirmed (Pet. App. 1a-9a).

1. Before trial, petitioner and co-defendants Herndon and Thomas Jones moved to suppress evidence seized from premises leased by petitioner in a rural area of Dade County, Florida. The evidence adduced at the suppression hearing showed that at approximately 7:30 p.m. on April 12, 1974, two local police officers were dispatched to 19955 S.W. 248th Street, the location of the house and barn rented by petitioner. The officers were sent to investigate a telephone report that shots had been fired in the area (Pet. App. 12a). As the officers approached the address, they were met by a woman who advised them that one of the participants in the alleged shooting

[2] Petitioner was convicted on August 1, 1975, but failed to appear for sentencing on August 20, 1975. He remained a fugitive for nearly three years and was not sentenced until June 23, 1978, following his apprehension.

was sitting in an automobile parked nearby (*id.* at 13a). The officers found co-defendant Thomas Jones sitting in a car parked at the corner specified by the unidentified woman (*ibid.*). A bystander identified Jones as a resident at the address to which the officers had been sent and a participant in the alleged shooting incident (*ibid.*).

Officer Robert Dwyer proceeded to the house while Officer David Charter remained with Jones, who was not yet under arrest. Several neighbors informed Officer Dwyer that they had observed three white males leave the barn shortly before the shots were fired. According to the reports, one of the men entered an automobile and drove it around to the front of the house and the other two men went inside the house. When they came out, the shots were fired in the immediate area (Pet. App. 13a). After receiving this information, Officer Dwyer heard the telephone ring inside the house. The officer looked through the window into the living room and then entered the house and answered the telephone (*ibid.*).[3] A voice on the other end of the line said, "You hit Bobby Joe and now you're going to prison" (S.H. 17).[4]

Officer Dwyer looked through the house for injured persons or suspects. Finding none, Dwyer called Officer Charter by radio and asked him to come to the

[3] The door of the house was unlocked and partially open (Pet. App. 13a).

[4] "S.H." refers to the transcript of the pretrial hearing on petitioner's motion to suppress.

barn (Pet. App. 14a). By this time, Officer Charter had arrested Thomas Jones for loitering and prowling "because he could not explain his presence in the area" (*ibid.*). Officer Charter arrived at the barn with Jones in the back seat of his patrol car. The two officers entered the barn through a door that was four to six inches open (*ibid.*). Equipped with flashlights, the officers searched the barn for possible victims of the shooting. During the brief search, the officers saw what appeared to be a still in the rear portion of the barn (*ibid.*). The officers called for additional assistance and were joined shortly by local police lieutenant Tom Lyons. Lieutenant Lyons entered the barn with the two officers and observed the still. He then telephoned the police station and asked that Agent George Nowicki of the Bureau of Alcohol, Tobacco and Firearms be notified of the discovery of the still (*ibid.*).

ATF Agents Nowicki and Jimmy Harmon arrived at the barn at approximately 10 p.m. (Pet. App. 15a). Agent Nowicki read Thomas Jones his rights. On a socket wrench head taken from Jones when he was searched incident to his arrest, Agent Nowicki found "mash" from a distilling process (*ibid.*). Agent Nowicki then asked Jones to remove his shoes for possible evidence, and Jones did so (S.H. 116). Agents Nowicki and Harmon entered the barn and saw the still. They also noticed jugs of whiskey stacked near the vats of the still (S.H. 305). At trial, Agents Nowicki and Harmon testified that they found 580 gallons of clear white whiskey in five-gallon

plastic jugs standing in front of the still (Tr. 446-447, 458-459). The agents observed that an electrically powered water pump near the front of the barn supplied the still with water.

The agents followed the pump's electric wires from the barn into the house. In an open closet next to the electrical panel where the wires terminated, the agents found several gas company receipts.[5] In addition, the agents seized a telephone directory from a partially open table drawer in the kitchen[6] and a pair of shoes that were on the bedroom floor and had mash on the soles (Pet. App. 15a; S.H. 118-120).

The agents then looked into a truck-camper parked in front of the house (Pet. App. 16a). Inside the truck were cardboard cartons with labels identical to those found on similar cartons that the agents had seen next to the still.[7] The agents opened the truck and found that some of the cartons were soaked with whiskey and that the inside of the truck smelled of whiskey. A search of the glove compartment revealed an auto repair receipt signed by co-defendant Mimbs (*ibid.*; S. H. 120-122). Leaving the truck, the agents went behind the house and discovered a small shed.

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[5] The receipts reflected several purchases of butane gas in large amounts sufficient for the manufacture of illicit whiskey (see, *e.g.*, Tr. 237-279, 282).

[6] Several local telephone numbers, including petitioner's, were written on the inside cover of the directory (S.H. 119).

[7] At trial, the government showed that the cartons had contained plastic jugs used to bottle the illicit whiskey (Tr. 63-82).

They entered the shed and found 70 gallons of whiskey packaged in 14 five-gallon plastic jugs (S.H. 124-126, 157-158). The agents then returned to the automobile in which Thomas Jones had been sitting when he was first seen by the county police officers. Inside, the ATF agents saw a six-gallon green plastic jug similar to one found near the still (Pet. App. 16a; S.H. 126, 150-151). Under the front seat of the car, the agents discovered a hydrometer (Pet. App. 16a; S.H. 129).

2. The district court denied the motion to suppress. The court found that the county police officers' discovery of the still was lawful, because it occurred during the course of a lawful search for possible victims of the alleged shooting incident. "Being in a place where they had a right to be, the officers found the still because it was in plain view" (Pet. App. 17a-18a). The district court also sustained the federal agents' subsequent search of the barn because it "was based upon a legal search by the county officers * * * [and] was directly related to the object of the county search" (*id.* at 19a). Relying on *United States* v. *Green*, 474 F.2d 1385 (5th Cir.), cert. denied, 414 U.S. 829 (1973), the court explained (Pet. App. 21a):

> The rationale which justifies the federal search is that the subsequent intrusion does not significantly increase a preexisting legitimate interference with a protected interest. * * * [T]he subsequent search does not significantly add to the invasion of privacy caused by the initial

> search * * *[. T]he successive intrusions [were] close in time, practically identical in nature and analytically and factually separable only because made by two different sovereigns.

The court did not separately discuss the validity of the search of Thomas Jones incident to his arrest or the validity of the federal agents' search of the house rented by petitioner, the truck-camper parked outside, the shed behind the house, or the car in which Jones was sitting when first seen by the county police officers.

3. On August 3, 1975, two days after the jury returned its verdict, juror Barbara Toomer was contacted by Debra Jones, petitioner's wife, and a man later identified as Willie Lucas. Lucas solicited the juror's agreement that petitioner had been "shanghaied." The juror reported this incident to the district court, and, on August 4, the court ordered the United States Attorney and the ATF to conduct an investigation (Pet. App. 2a).

On August 5, petitioner filed a motion to interview the jurors. In support of the motion, petitioner submitted an affidavit in which Lucas described certain post-verdict statements allegedly made by another juror, Arlie Crooms. Lucas stated that Crooms had told him that she did not feel the proper verdict had been rendered, that there was no proof that petitioner owned the still, and that she had voted for conviction only because of pressure from other jurors and her own illness during the deliberations (*id.* at 2a-3a).

During the court-ordered investigation, ATF agents interviewed all the jurors. Juror Irma Reboso revealed that during the trial Crooms told her that she, Crooms, had been offered $1000 to vote for acquittal. When asked about this reported bribe offer, Crooms initially denied any such improper approach. During a subsequent interview, however, she recanted and informed the ATF that Lucas had offered her a bribe to vote to acquit petitioner (*id.* at 3a).

On August 20, 1975, the district court conducted a hearing at which jurors Toomer, Reboso, and Crooms testified. Crooms acknowledged telling Reboso of the bribe offer. She stated, however, that they had not discussed the matter further and that she had "decided to forget about it" (H. Tr. 15-19).[8] Reboso confirmed her conversation with Crooms (H. Tr. 28-32). She testified that she had paid little attention to the incident, that she had not discussed it with anyone else, and that it had not affected her ability to render a fair and impartial verdict (H. Tr. 33-38). Toomer related the details of the post-verdict approach by Lucas and petitioner's wife (H. Tr. 40-43). Although afforded the opportunity to do so, petitioner's counsel did not question any of the three juror witnesses. In particular, he did not ask Crooms or Reboso whether their votes were affected in any way by the bribe offer.

At the conclusion of testimony, petitioner moved to set aside the verdict and, apparently, for a new trial (H. Tr. 44-45; Pet. App. 4a n.1). Petitioner's mo-

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[8] Crooms also corroborated many of the allegations in Lucas' affidavit concerning her comments after the trial (H. Tr. 19-23).

tion did not allege specifically that the jury was improperly biased against him as a result of the bribe attempt during trial. Rather, the motion seemed to concentrate on the doubts expressed by Crooms after trial concerning the correctness of the verdict. The district court denied petitioner's motion, stating that "[t]here is nothing appearing from the testimony of these [juror] witnesses to indicate a valid ground to challenge the verdict in this case" (H. Tr. 51).

4. On appeal, petitioner contended that all the evidence seized by the ATF agents should have been suppressed. Petitioner argued that, because the local police officers' search of the house and barn established that no victims or suspects in the alleged shooting incident were in either building, the federal agents' subsequent warrantless entry was not supported by exigent circumstances and was therefore unlawful. In support of this proposition, petitioner relied heavily on this Court's decisions in *Michigan* v. *Tyler*, 436 U.S. 499 (1978), and *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Petitioner did not separately attack any specific portions of the federal agents' search as unlawful, distinct from the initial search of the barn. See Appellant's Br. 20-21, 32-41; Reply Br. 11-18.

Citing *United States* v. *Green*, *supra*, and *United States* v. *Brand*, 556 F.2d 1312 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978), the court of appeals sustained the challenged search and seizures for the reasons stated by the district court (Pet. App. 8a-9a). Without deciding whether *Tyler* and *Mincey*

are in any way inconsistent with *Green* and *Brand*, the court of appeals ruled that this Court's 1978 decisions "should not be applied retroactively on the facts of this case" (*id.* at 9a).

Petitioner also argued that he is entitled to a new trial because the court-ordered posttrial investigation showed that Lucas attempted to bribe one of the jurors during trial and that the affected juror told at least one other juror of the bribe offer. The court of appeals rejected this contention (Pet. App. 5a-8a) without addressing the question whether the bribe attempt unfairly prejudiced petitioner's position at trial. Treating petitioner's appeal as an appeal from the denial of the oral new trial motion by counsel at the August 20, 1975 hearing, the court stated that, under Fed. R. Crim. P. 33, a new trial motion made more than seven days after verdict "cannot be entertained unless it is based on newly discovered evidence" (Pet. App. 5a). The court further declared that a new trial motion based on newly discovered evidence can succeed only if "that evidence [was] in fact unknown to the movant until after the verdict" and the movant's "failure to discover [the evidence] prior to verdict was not due to his lack of diligence" (*id.* at 6a-7a). Because petitioner "presented no evidence whatever on the issues of his lack of knowledge or his due diligence" and, in fact, did not even disclaim pre-verdict knowledge of the bribe offer (*id.* at 8a), the court of appeals concluded that it was unnecessary to inquire into possible prejudice arising from the attempted jury tampering.

ARGUMENT

1. Petitioner now repeats his argument (Pet. 15-20) that all the evidence seized by the ATF agents should have been suppressed because no exigent circumstances justified the agents' warrantless search of any of the areas in or around the house and barn on the leased premises. Petitioner again fails to differentiate among the various areas entered by the federal agents and the various kinds of evidence seized. Instead, he argues simply that, because the county police officers' search of the house and barn uncovered neither suspects nor victims nor evidence of the alleged shooting, there was no justification for a later warrantless entry by federal agents anywhere on the premises. Apparently conceding for the sake of argument that the ATF agents' search and seizures were proper under Fifth Circuit law at the time they occurred, petitioner contends that this Court's subsequent decisions in *Michigan* v. *Tyler*, *supra*, and *Mincey* v. *Arizona*, *supra*, demonstrate the illegality of the agents' conduct. The court of appeals found it unnecessary to address that argument, because it held that, to the extent *Tyler* and *Mincey* might be thought to render invalid searches previously permissible under Fifth Circuit law, those decisions should not be applied retroactively. See *United States* v. *Peltier*, 422 U.S. 531 (1975), and cases cited therein. In this connection, petitioner now presents only the question whether the court of appeals erred in its retroactivity ruling; he does not ask this Court to review the lawfulness of each

portion of the search performed by Agents Nowicki and Harmon.

This case does not present a suitable occasion for the Court to resolve whatever retroactivity issues may arise from the decisions in *Tyler* and *Mincey*. The primary incriminating evidence against petitioner was seized in the search of the barn. There, the county police and the federal agents found the still, several hundred gallons of illegal whiskey, and assorted paraphernalia used in the illicit distilling operation. Petitioner conceded in the court of appeals (Appellant's Br. 11) that Officers Dwyer and Charter acted lawfully in searching the house and barn for suspects or victims in the reported shooting incident. He does not withdraw that concession here. The county officers discovered the still in the course of their legal search of the barn. Under these circumstances, *Tyler* and *Mincey* provide no support for petitioner's objection to the federal agents' entry and search of the same building two or three hours later. Neither in those cases nor in any other has this Court suggested that a law enforcement officer who observes contraband or probable illegal activity on private premises where he has a right to be is constitutionally precluded from inviting other officers to join him in investigating the criminal behavior he has discovered. Indeed, *Tyler* holds precisely the opposite.

In *Tyler*, a local fire chief arrived at the scene of a fire shortly after the blaze had been extinguished. While firemen watered down the smoldering embers,

the chief was informed by one of his lieutenants that two plastic containers of flammable liquid had been found in the building. After the chief examined the containers, he called a local police detective who came to the scene and inspected the burned building. The chief and the detective removed the containers and took them to the fire station for safekeeping. Approximately four hours later, after all the firefighters had departed, the chief and his assistant returned to the scene and made a cursory inspection of the building. The assistant and the detective returned again an hour later and conducted a more thorough search during which they found and seized significant additional evidence of arson. None of the entries by the chief, his assistant, or the detective was supported by a warrant. Nonetheless, the Court held (436 U.S. at 510-511) that the searches conducted at the close of the firefighting operation and several hours later were lawful. After stating generally that fire "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished," the Court observed that the additional entries later in the day "were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence" (*id.* at 510, 511).

The reasoning in *Tyler* is entirely consistent with the Fifth Circuit's approach in *United States* v. *Brand*, *supra*, and *United States* v. *Green*, *supra*, on

which the court of appeals in the present case relied. As the court stated in *Brand* (556 F.2d at 1317):

> The [Fourth] amendment protects the citizen against invasion of privacy. Once that interest is invaded legally by an official of the State, the citizen has lost his reasonable expectation of privacy to the extent of the invasion. * * * [A]dditional investigators or officials may therefore enter a citizen's property after one official has already intruded legally. * * * Later arrivals may join their colleagues even though the exigent circumstances justifying the initial entry no longer exist. * * *

See also *Steigler* v. *Anderson*, 496 F.2d 793, 797-798 (3d Cir.), cert. denied, 419 U.S. 1002 (1974).

Here, the ATF agents' inspection of the still and the related evidence of illegal activity in the barn involved no further intrusion into an area in which petitioner retained a legitimate expectation of privacy. Once the still had been lawfully discovered by law enforcement personnel, petitioner no longer could have had any legitimate expectation that the contents of the still's metal vats and the surrounding plastic jugs would remain undisturbed. The ATF agents' seizure of incriminating evidence from the barn was thus entirely proper.

For reasons that are easily understandable, petitioner does not make any separate contention that this Court should consider the retroactivity of *Tyler* and *Mincey* solely for the effect those decisions may have on the legality of some aspect of the federal

agents' investigation other than the search of the barn. *Tyler* and *Mincey* held that warrantless entries or searches involving intrusions significantly different from or broader than an initial lawful intrusion cannot be justified solely on the basis of the initial entry.[9] Petitioner might argue that a proper application of the Fourth Amendment principles discussed in those cases would cast doubt on the propriety of the ATF agents' seizure of evidence at one or more locations outside the barn.[10] But petitioner does not advance

[9] *Tyler* refused to approve a warrantless police entry and search of the burned building nearly a month after the fire, and *Mincey* condemned an extensive four-day search of an apartment in which an abortive drug transaction had led to the murder of an undercover police officer. The State in *Mincey* attempted unsuccessfully to defend the search on the ground that it involved an invasion of privacy no more intrusive than the emergency police entry immediately after the shooting to arrest the suspects and aid the victims.

[10] Petitioner would not, in any event, be able to assert any legitimate expectation of privacy in the items seized from Donald Jones at the time of his arrest or in the car in which the local police found Jones on their way to investigate the shooting incident. He therefore could not raise any Fourth Amendment objection to the introduction of evidence obtained from those sources. *Rakas* v. *Illinois*, 439 U.S. 128 (1978); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). The ATF agents' search of the truck-camper was lawful, because the agents were properly present on petitioner's premises when they looked through the truck's window and saw cardboard cartons similar to those found near the still in the barn. The cartons and their labels, combined with the truck's location, gave the agents probable cause to believe that the truck contained evidence of a crime. Under this Court's decisions, the ensuing entry and search were therefore proper. See *Texas* v. *White*, 423 U.S. 67 (1975); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). The agents' search of the house was not clearly more intrusive than the previous, concededly lawful, entry by the county police officers, and in any event produced little probative evidence of petitioner's participation in the illegal distilling operation. Finally, since the local officers apparently did not search the shed behind the house for victims or suspects in the alleged shooting, the ATF agents' entry there was arguably justifiable as a continuation of the investigation into the reported shooting. Moreover, the 70 gallons of illegal whiskey found in the shed could hardly have had any substantial independent effect on the jury's decision, in light of the much larger quantity of the same product found earlier in the barn.

any such argument, presumably because, even if accepted, it would be unavailing. The critical evidence of petitioner's guilt was found in the barn. As we have shown, at least that portion of the ATF agents' search was lawful, under *Tyler* as well as earlier Fifth Circuit precedents. The evidence seized from the house, the shed, the truck-camper, Donald Jones, and the car in which he was sitting was either cumulative or not connected with petitioner. In light of the strong incriminating evidence discovered in the barn, suppression of any or all of the evidence found elsewhere could not reasonably have been expected to affect the jury's verdict.

2. Petitioner also contends (Pet. 9-15) that the district court should have set aside the verdict and granted a new trial because of the bribe offer to the juror Crooms. Relying on *Remmer* v. *United States*, 347 U.S. 227 (1954), petitioner asserts that any extraneous communication with one or more jurors during trial is "presumptively prejudicial" and im-

poses on the government the heavy burden of showing that the contact was harmless to the defendant. Petitioner ignores the several significant obstacles to acceptance of his argument.

In the first place, there is considerable doubt whether petitioner raised in the district court the question of the bribe offer's alleged prejudicial effect. During the August 20, 1975 hearing prompted by the posttrial contact with the juror Toomer by petitioner's wife and Lucas, petitioner's counsel did not question either Crooms or Reboso about the possible effect on the jury's deliberations of the bribe attempt directed at Crooms. Counsel's motion to set aside the verdict at the close of the hearing (Pet. App. 4a n.1) did not call the court's attention to the harm allegedly suffered by petitioner as a result of the bribe offer. Rather, it seemed to concentrate on the representations in Lucas' affidavit, corroborated by Crooms and in part by Reboso, that Crooms was not feeling well during the jury's deliberations and voted to convict petitioner at least in part because she wanted to go home and feared that continued disagreement with her fellow jurors would prolong her jury service through a retrial of petitioner on the pending charges. As the district court correctly held (H. Tr. 46-51), such matters are not a proper basis for impeachment of jury's verdict. See Fed. R. Evid. 606(b); *McDonald* v. *Pless*, 238 U.S. 264 (1915). Petitioner does not now suggest otherwise.

Secondly, petitioner has neither alleged nor proved that he was not responsible for and did not know

about the bribe attempt before verdict. Instead, he has relied entirely on his assertion that the government adduced no evidence to show that he knew of the bribe offer during trial or was involved in the attempted jury tampering. As the court of appeals correctly observed (Pet. App. 7a), *Remmer* was litigated and decided on the assumption that, although the court and the prosecutor were aware of the improper jury contact during trial, the defendant first learned of it by reading about it in the newspapers after his conviction. This is a significant difference between the two cases. Petitioner should not be permitted to demand either that the government prove lack of prejudice or that he be granted a new trial when he is not willing even to allege that he was not connected with and did not know about the bribe attempt before verdict. Otherwise, a defendant who learns about such a contact during trial, whether or not he is responsible for it, will be encouraged to remain silent and hope for an acquittal, secure in the knowledge that a conviction will be set aside unless the government can carry the burden imposed by *Remmer*.

Petitioner's position is especially objectionable in the circumstances of the present case, because neither he nor Lucas appeared (see Pet. App. 3a-4a) at the hearing held to investigate both the posttrial contact with juror Toomer by Lucas and petitioner's wife and the allegations in Lucas's affidavit concerning juror Crooms' posttrial explanation of her vote to

convict.[11] The government was thereby prevented from inquiring into the reasons for the bribe attempt, the source of the idea that such an effort should be made, and petitioner's knowledge of the incident. Petitioner now concedes (Pet. 11) that "[e]vidence that the defendant knew about the bribe attempt before the verdict but chose to do nothing would establish * * * harmlessness, because the error would have been invited by the defendant." But petitioner seeks to take advantage of his fugitive status and Lucas's trip to Nassau at the time of the August 20 hearing by arguing that the government failed to demonstrate the extent of his involvement in or knowledge of the attempted jury tampering. The court of appeals properly rejected this effort.[12]

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[11] Petitioner was apparently last seen on the morning of the day of the hearing; he disappeared between that time and his scheduled court appearance later in the day. He was ultimately apprehended three years later.

[12] The court of appeals based its decision in part on the fact that petitioner's motion to set aside the verdict was made more than seven days after trial. The court therefore treated the motion as a motion for a new trial based on newly discovered evidence under Fed. R. Crim. P. 33. Although the matter need not be resolved in this case because petitioner's motion *was* made outside the seven-day period ordinarily provided for new trial motions, it is not clear that the standards for evaluating requests for a new trial based on alleged jury tampering should vary with the time when the motion is filed. Even if such a motion is made promptly after verdict, the district court should still view it with great skepticism if it does not allege lack of knowledge of the improper contact during trial.

Finally, assuming arguendo that the question of the bribe attempt's effect on the jury was properly preserved by petitioner, the district court's posttrial inquiry sufficiently established that Lucas's improper contact with juror Crooms during trial did not deny petitioner a fair verdict. Testimony at the hearing showed that, although Crooms was initially upset by the incident and asked for advice on the subject from juror Reboso (H. Tr. 18), she soon "decided to forget about it" (H. Tr. 19) and did not discuss the matter further with Reboso or any other juror. Crooms acknowledged that she should have reported the offer to the court immediately, but she explained that she "didn't say anything" because she did not intend to "become involved" with the bribe (H. Tr. 25).[13] Similarly, Reboso testified that, after she learned from Crooms of the bribe offer, she "didn't think of it at all" (H. Tr. 32). Reboso was confident that the information relayed by Crooms did not affect her ability to render a fair and impartial verdict (H. Tr. 35-38). In these circumstances, the district court did not err in denying petitioner's motion to set aside his conviction (H. Tr. 51). See *United States* v.

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[13] Crooms' reaction to the improper contact by Lucas further distinguishes this case from *Remmer*. Unlike the affected juror in the earlier case, Crooms was not sufficiently disturbed by the contact to notify the court, and consequently there was no law enforcement investigation of the matter during the trial that may have affected the jurors' deliberations. In *Remmer*, the district court ordered an FBI investigation during trial, and the affected juror was visited at his place of business by a federal agent who informed him of the court-ordered inquiry.

Fleming, 594 F.2d 598, 608 (7th Cir.), cert. denied, No. 78-6335 (June 11, 1979).

Because of his personal familiarity with the evidence presented at trial, the general demeanor of the proceedings, and the conduct of the jury, the trial judge is uniquely well situated to evaluate the likelihood that an isolated extraneous communication with a single juror would have irreversibly contaminated the impartiality of the jury's deliberations. For this reason, several courts of appeals have recognized that district courts inevitably exercise a substantial degree of discretion in ruling on claims of unfairness at trial and that such rulings should not be overturned unless the facts show that the trial judge clearly abused his discretion in assessing the probability of prejudice in a given case. *United States* v. *Albert*, 595 F.2d 283, 290 (5th Cir.), cert. denied, No. 79-207 (Nov. 26, 1979); *United States* v. *Boscia*, 573 F.2d 827, 832 (3d Cir.), cert. denied, 436 U.S. 911 (1978); *Morgan* v. *United States*, 399 F.2d 93, 97 (5th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); *Little* v. *United States*, 331 F.2d 287, 295 (8th Cir.), cert. denied, 379 U.S. 834 (1964). No such abuse occurred here.

Petitioner insists (Pet. 12-13) that the court of appeals' decision conflicts with *Marshall* v. *United States*, 436 F.2d 155 (D.C. Cir. 1970). Petitioner's own argument demonstrates the fallacy of that assertion, however. Not only was the evidence adduced at the posttrial hearing sufficient to show lack of prejudice in the present case, but petitioner himself

admits (Pet. 11) that, if he did know of the attempted bribe during trial but kept silent, he would have no legitimate ground for seeking to set aside the verdict. Petitioner thus concedes that, unlike the improper lineup issue considered in *Marshall*, the proper resolution of a jury tampering question does depend in part on the extent of the defendant's konwledge during trial. Moreover, the court of appeals in *Marshall* addressed only constitutional error, and it is not certain that the procedure and evidentiary burden established in *Remmer* are constitutionally compelled. Neither this Court's initial opinion in *Remmer* nor its later opinion after remand (350 U.S. 377 (1956)) purports to find in the Constitution a basis for the "presumption of prejudice" on which petitioner now relies. Petitioner's alleged conflict with *Marshall* is thus speculative at best and does not provide an appropriate occasion for review by this Court.[14]

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[14] The decision in *Marshall* was premised upon the proposition that the claim in that case could have been raised in a collateral attack upon the conviction, without regard to whether the defendant knew or should have known of the existence of the claim prior to trial; therefore, the court concluded, it was pointless to subject the defendant to a due diligence requirement simply because he elected to proceed under Fed. R. Crim. P. 33. Subsequent to the decision in *Marshall*, Fed. R. Crim. P. 12 has been amended to provide for a waiver of claims for suppression of evidence if not timely raised prior to trial, unless excused by a showing equivalent to the due diligence showing required under Rule 33. Since the premise that underlay *Marshall* is no longer viable, the case should not in any event be viewed as creating a conflicting precedent requiring the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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